

**United States Department of Labor
Employees' Compensation Appeals Board**

S.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Santa Ana, CA, Employer**

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**Docket No. 19-0225
Issued: July 23, 2019**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 8, 2018 appellant filed a timely appeal from a June 27, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated September 1, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 8, 2015 appellant, then a 55-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 13, 2015 he sustained a right lumbar injury with right-

¹ 5 U.S.C. § 8101 *et seq.*

sided radiculopathy when sweeping, loading, and lifting mail while in the performance of duty. He did not stop work.

In a report dated May 8, 2015, Dr. Gary Linnemann, a treating Board-certified family practitioner, diagnosed a lumbar strain. He restricted appellant to limited-duty work.² Appellant accepted a modified-duty position on May 12, 2015.

By decision dated June 23, 2015, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between appellant's diagnosed conditions and the accepted March 13, 2015 employment incident.

On November 13, 2015 appellant requested reconsideration and submitted additional medical evidence.

In a report dated September 29, 2015, Dr. Basimah Khulusi, a treating Board-certified physiatrist, noted appellant's history of a 2010 back injury³ and the March 13, 2015 employment incident. She diagnosed lumbar radiculopathies, lumbar spondylolisthesis, and lumbar spinal stenosis causally related to the March 13, 2015 employment incident. Dr. Khulusi explained that twisting while processing mail had created torque forces on disc spaces already under excessive loading forces, causing annular disc protrusions and spinal stenosis. She submitted periodic reports through February 8, 2016 restricting appellant to limited-duty work.

By decision dated February 11, 2016, OWCP vacated its prior decision, as the evidence submitted was sufficient to warrant modification. By separate decision dated February 11, 2016, it accepted the claim for a lumbar strain. OWCP paid his compensation commencing August 3, 2015 for intermittent wage loss to attend medical appointments and physical therapy treatments.

On February 29, 2016 appellant requested reconsideration. In support of his request, he submitted a report dated February 18, 2016 by Dr. Khulusi. She opined that the March 13, 2015 employment incident had increased the severity of appellant's preexisting lumbar disc protrusions, causing a disc extrusion at L5-S1 and right-sided lumbar radiculopathy.

On May 20, 2016 OWCP obtained a second opinion regarding the nature and extent of the accepted lumbar injuries from Dr. Aubrey Swartz, a Board-certified orthopedic surgeon. Dr. Swartz reviewed the medical record and statement of accepted facts. On examination, he found no lumbar tenderness on palpation, negative straight leg raising tests bilaterally, and a normal neurologic examination of the lower extremities. Dr. Swartz opined that the March 13, 2015 employment incident had caused a lumbar strain with temporary aggravation of preexisting

² An August 10, 2015 lumbar magnetic resonance imaging (MRI) scan demonstrated disc protrusions at L2-3, L3-4, and L4-5 causing moderate-to-severe stenosis at each level. September 11, 2015 electrodiagnostic studies of the lower extremities demonstrated right L4 chronic radiculopathy, bilateral L5 subacute radiculopathy with ongoing denervation, and bilateral S1 subacute radiculopathy.

³ Appellant has a prior claim involving an August 2, 2010 injury. OWCP assigned that claim File No. xxxxxx493 and accepted it for lumbar strain. Appellant's claims have not been administratively combined. An October 27, 2011 lumbar MRI scan demonstrated mild central canal stenosis with disc protrusions at L1-2 and L2-3, and mild left L5-S1 foraminal stenosis.

multilevel spinal conditions that had ceased no later than May 8, 2015. He explained that spinal stenosis was an idiopathic process unrelated to trauma or acute injury.

By decision dated June 7, 2016, OWCP vacated its February 11, 2016 reconsideration decision, finding that the evidence submitted on reconsideration was sufficient to modify the prior decision. By separate decision dated June 7, 2016, it expanded its acceptance of the claim to include a temporary aggravation of preexisting disc herniations/protrusions at L4-5 and L5-S1, resolved as of May 8, 2015.

On September 6, 2016 appellant requested reconsideration. In support of his request, he provided an August 18, 2016 report by Dr. Khulusi. Dr. Khulusi argued that Dr. Swartz's opinion was erroneous as he failed to recognize that appellant's traumatic injury had resulted in spinal stenosis. She contended that the accepted lumbar strain had caused soft tissue swelling, compromising the nerve roots and spinal canal, which resulted in lumbar radiculopathy. Dr. Khulusi also asserted that the aggravation of preexisting degenerative disc disease should be considered permanent.

By decision dated December 1, 2016, OWCP denied modification. It found that Dr. Khulusi's opinion was not sufficiently reasoned to outweigh Dr. Swartz's opinion.

On January 3, 2017 appellant requested reconsideration. He submitted reports from Dr. Khulusi dated September 6 and December 7, 2016 diagnosing permanent aggravation of disc protrusions/herniations, and permanent aggravation of spinal stenosis. In a narrative report dated December 22, 2016, Dr. Khulusi contended that there was a conflict of medical opinion between herself and Dr. Swartz regarding the nature and extent of the employment injuries.

By decision dated February 23, 2017, OWCP denied modification as the additional evidence submitted was insufficient to outweigh Dr. Swartz's opinion.

On March 20, 2017 appellant requested reconsideration. He submitted a March 9, 2017 report by Dr. Khulusi contending that her experience as a physiatrist was more germane to appellant's case than Dr. Swartz's training as an orthopedic surgeon. In an April 5, 2017 report, Dr. Khulusi reiterated her previous diagnoses and maintained appellant on modified duty.

By decision dated May 8, 2017, OWCP denied modification of its prior decision.

On June 5, 2017 appellant requested reconsideration. In support of his request, he provided a May 25, 2017 report from Dr. Khulusi, requesting that OWCP expand its acceptance of the claim to include lumbar radiculopathies, permanent aggravation of disc protrusions/herniations, and permanent aggravation of spinal stenosis. Dr. Khulusi again contended that there was a conflict of medical opinion between Dr. Swartz and herself regarding the nature and extent of the employment-related conditions. In August 2, 2017 reports, she repeated previous diagnoses and continued to restrict appellant to modified-duty work.

By decision dated September 1, 2017, OWCP denied modification of its prior decision.

On March 29, 2018 appellant requested reconsideration. In support of his request, he submitted a March 22, 2018 report from Dr. Khulusi, reiterating her August 18, 2016 opinion that

a traumatic lumbar injury could cause spinal stenosis. Dr. Khulusi repeated her disagreement with Dr. Swartz's opinion that a spinal injury could not cause spinal stenosis. She enclosed medical literature on spinal stenosis which indicated that spinal injuries could cause swelling and pressure on the spinal cord and nerve roots.

By decision dated June 27, 2018, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant review of its September 1, 2017 decision. It found that his request for reconsideration did not raise new, substantial legal questions nor include new, relevant evidence. OWCP further found that Dr. Khulusi's March 22, 2018 report merely repeated her prior arguments and opinions and was therefore cumulative in nature. It also found that the medical literature submitted was irrelevant or immaterial to the claim.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under FECA section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴

A request for reconsideration must be received by OWCP within one year of the date of its decision for which review is sought.⁵ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁶ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁷

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

In his application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, and he did not advance a new and relevant legal argument not previously considered. The underlying issue on appeal is whether the medical evidence of record establishes that OWCP should expand its acceptance of the claim to include lumbar radiculopathies, permanent aggravation of disc protrusions/herniations, and permanent aggravation of spinal stenosis. Appellant submitted Dr. Khulusi's March 22, 2018 report reiterating her August 18, 2016 opinion. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record does not

⁴ 20 C.F.R. § 10.608(b)(3); *see also* *H.H.*, Docket No. 18-1660 (issued March 14, 2019); *L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁵ 20 C.F.R. § 10.607(a).

⁶ *Id.* at § 10.608(a); *see also* *M.S.*, 59 ECAB 231 (2007).

⁷ *Id.* at § 10.608(b); *H.H.*, *supra* note 4; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

constitute a basis for reopening a case.⁸ Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

In support of his reconsideration request, appellant's physician, Dr. Khulusi submitted medical literature on spinal stenosis. The Board has held that medical literature from publications is of no evidentiary value in establishing causal relationship between a claimed condition and employment factors because such materials are of general application and are not determinative of whether the specifically claimed condition is related to the particular employment factors alleged by the employee.⁹

Appellant also failed to submit relevant and pertinent new evidence not previously considered by OWCP. Consequently, he is not entitled to a review of the merits of his claim based on the third above-noted requirements under 20 C.F.R. § 10.606(b)(3). The Board, accordingly, finds that pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁰

On appeal, appellant contends that Dr. Khulusi's March 22, 2018 letter had proven that Dr. Swartz erred by opining that spinal stenosis could not be caused by an injury. This argument, however, pertains to the merits of the claim. As explained above, the Board lacks jurisdiction over the merits of this case.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

⁸ *J.B.*, Docket No. 18-1531 (issued April 11, 2019); *see L.R.*, Docket No. 18-0400 (issued August 24, 2018); *Candace A. Karkoff*, 56 ECAB 622 (2005).

⁹ *F.D.*, (*S.D.*), Docket No. 18-1528 (issued April 10, 2019); *A.S.*, Docket No. 18-0376 (issued July 18, 2018); *William C. Bush*, 40 ECAB 1064, 1075 (1989).

¹⁰ *J.B.*, *supra* note 8; *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006) (when an application for reconsideration does not meet at least one of the three requirements enumerated under 20 C.F.R. § 10.606(b), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 23, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board